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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| JANE DOE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ANDREW WEST REID, JR.,<br><br>Defendant and Appellant. | B231807<br><br>(Los Angeles County<br>Super. Ct. No. GC041714) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph F. De Vanon, Judge. Reversed and remanded with directions.

Law Offices of Diana Spielberger, Diana Spielberger for Defendant and Appellant.

Law Office of Anthony M. De Marco, Anthony M. De Marco; Kiesel Boucher Larson, Raymond P. Boucher; Jeff Anderson & Associates, Michael G. Finnegan and Sarah G. Odegaard for Plaintiff and Respondent.

## INTRODUCTION

Defendant and appellant Andrew West Reid, Jr., appeals from a judgment[1] in favor of plaintiff and respondent Jane Doe on her causes of action for sexual battery and breach of fiduciary duty. Defendant contends that the trial court erred in proceeding to trial in his absence while he was incarcerated and could not appear telephonically, awarding compensatory damages against him based on the irrelevant federal child pornography statute, and in awarding future medical and punitive damages not supported by substantial evidence.

We conditionally reverse as to liability, remanding this matter for the trial court to conduct the required investigation on whether defendant willfully failed to avail himself of the right to appear by some means, which investigation the trial court had not conducted. We reverse as to damages because of insufficient evidence supporting the amount of such damages.

## BACKGROUND

Defendant pleaded no contest to, and was convicted in the Superior Court of, two felony counts of committing lewd acts upon a child in violation of Penal Code section 288, subdivision (a). The trial court sentenced defendant to six years in state prison as to count one, and six years on count two to run concurrently with count one.

Thereafter, defendant pleaded guilty in the United States District Court to possession of child pornography in violation of Title 18 United States Code section 2252A(a)(5)(B). The district court sentenced defendant to eight years in prison to run concurrently to the term of imprisonment emanating from the California trial court.

Plaintiff, a minor, filed a complaint alleging causes of action against defendant for sexual battery and breach of fiduciary duty, and against defendant's wife for negligent

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[1] Defendant also appeals from an order denying a motion for new trial. An order denying a motion for new trial is not independently appealable, but is reviewed upon the appeal from the underlying final judgment against the complaining party. (*People v. Ault* (2004) 33 Cal.4th 1250, 1261; *People v. Lavergne* (1971) 4 Cal.3d 735, 745.)

supervision and breach of fiduciary duty.[2] Plaintiff alleged, inter alia, that defendant sexually abused her when she was six years old and took at least 16 pornographic images of her. Plaintiff alleged that defendant was a friend of plaintiff's family, a renowned director for children's shows, and utilized his position of trust to gain access to plaintiff and sexually abuse her.

On February 5, 2009, the trial court issued an order granting defendant's application for waiver of court fees and costs. (Gov. Code, § 68630 et seq.; California Rules of Court, rules 3.50 to 3.58.) This would entail a determination of defendant's indigency. (See *Board of Medical Quality Assurance v. Superior Court* (1988) 203 Cal.App.3d 691, 695 [mandamus proceeding].) There was no indication that defendant's financial condition had changed since the time he obtained a waiver of court fees and costs based on indigency. At a bench trial conducted on November 15, 2010, the trial court found in favor of plaintiff and against defendant and awarded plaintiff $2,400,000 in pain and suffering damages, $500,000 in future medical expenses, and $2,500,000 in punitive damages.

## DISCUSSION

### A. Meaningful Access to the Courts

Defendant contends that the trial court erred by denying him meaningful access to the courts by proceeding to trial in his absence.

#### *1. Background*

Defendant states he was in federal custody when the complaint was filed. The trial court issued an order granting defendant's application for waiver of court fees and

[2] Defendant's wife is not a party to this appeal.

costs.[3] Defendant filed an answer to the complaint. Throughout the pendency of the action, until after the trial, defendant acted in propria persona.

The trial of this matter originally was scheduled to occur on September 28, 2010. On September 20, 2010, defendant filed a trial brief, attaching exhibits.

At the September 23, 2010, final status conference, the trial was continued to October 18, 2010, and the trial court ordered that the matter proceed as a one-day bench trial. The record does not disclose the reason or at whose request the trial was continued on this date, or as discussed below, on October 18, 2010. As set forth below, the trial of this matter was continued four times. Defendant represents, and plaintiff does not dispute, that all four of the trial continuances were either for the trial court's convenience or at the request of plaintiff's counsel.

On October 8, 2010, defendant filed a witness list and an exhibit list. On October 12, 2010, defendant filed a "Statement Regarding Jury Instructions," and a statement providing that arrangements for his telephonic appearance at the trial was being made by his Unit Manager, Mr. Colangelo. Defendant was still in federal custody. CourtCall issued a confirmation for defendant's telephonic appearance at the October 18, 2010, trial.

At the October 18, 2010, trial, the matter was continued to November 1, 2010. On October 26, 2010, defendant filed an amended exhibit list, attaching the exhibits. CourtCall issued a confirmation for defendant's telephonic appearance at the November 1, 2010, trial. At the November 1, 2010, trial, the trial court continued the trial to November 9, 2010, because it was engaged in trial on another matter.

On November 8, 2010, defendant prepared a statement stating that on that date he was informed that Mr. Colangelo, his unit manager, would be "out for a week," and defendant was making "an effort to find an alternative prison administrator that will grant the permission to use the phone and be present while I make the CourtCall for the Nov. 9, 2010 trial." There is no indication on the statement that it actually was filed, but during

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[3] Defendant's application is not part of the record.

the November 9, 2010, scheduled trial date proceeding, the trial court referenced a statement filed on November 5 or 8, 2010, and inquired of defendant whether he was having "some problems regarding appearance at trial?" Defendant, who appeared telephonically, advised the trial court that he was having problems appearing at trial, and stated, "[T]oday my unit manager is not present. He is on vacation. And I'm in an [*sic*] federal facility that has controlled moves. And it's only by the professional courtesy, one would say, by the unit manger, Miss Boverene (phonetic), who was kind enough to let me make this call in the absence of Mr. [Colangelo] who is my unit manager, who is required to be present while I am on the phone." The trial court stated, "All right. Thank you for bringing me up to date on that. [¶] This case presents—to be honest with you, it presents procedural hurdles that I have not dealt with in the past. In 24 years on the bench I don't think I have had a case where a custody party was not able to get them before the court. [¶] But the record should reflect that with regards to the defendant, he is in a federal facility. I do not have the authority to order the federal government to transport him to this court. Nor if I could get him here, I have neither the budget, nor the availability of bailiffs to secure them [*sic*] during court proceedings."

At the November 9, 2010, scheduled trial date proceeding, plaintiff's counsel advised the trial court that he would not be able to have his witnesses available for trial until that Friday, and suggested that trial commence then. The trial court stated, "My preference would be to push it off until Monday. [¶] I am afraid if [Mr. Colangelo] is not going to be available, [defendant], maybe not [be] able to make the phonecall."

Defendant advised the trial court at the November 9, 2010, trial that Mr. Colangelo was on vacation and would not be available the rest of the week or the following week. The trial court stated, "Let's do the following: If you give us a fax number or a contact number, [defendant], we'll fax a court order in and we'll—I mean a court order to give the federal authorities is really a suggestion. We'll give them a suggestion that the proceedings will start Monday morning and then we can begin testimony, I would say, at ten o'clock on Monday." The following exchange occurred: "[Trial court:] Do you have a number there, [defendant], we can send that order to? [Defendant:] I can give you the

name of [the] administrator in charge is Miss Devore. . . . But I don't know her extension number. That's not made available to us. [Trial court:] Can you call back and provide that to my clerk or send it to Terminal Island? [Defendant:] It would have to be sent to them, because they don't allow us—we are not allowed that kind of discourse. [Trial court:] We'll send in a copy of that order to Miss Devore. [¶] Does [Ms. Devore] have a title there, sir we can use? [Defendant:] I believe that she is unit manager, chief administrator. But that's using my nomenclature. [Trial court:] Okay."

The trial court stated at the hearing, "All right, gentlemen. I guess we'll have to sort where we are Monday morning. I don't really have any other good suggestions. We'll have to work our way through this. It's awkward, to say the least. [¶] You are certainly free, [defendant], to take whatever appellate writ you think might be of some assistance if you are dissatisfied with the tentative suggestion the court has given in regards how to proceed with the case. I can't think of another alternative, gentlemen."

At the November 9, 2010, hearing, defendant inquired of the trial court, "If Mr. [Colangelo] is not back, and I am not able to be allowed to use the phone, what should I do?" The trial court responded, "I don't have a good alternative for you. I don't know. Have someone call and notify me, and maybe we can try later on in the day. [¶] This case has to proceed. . . . I would like to as much as possible have you be actively involved, [defendant]. . . . There is [*sic*] things that are beyond my control." The defendant stated, "Yes sir. Unfortunately I am in a similar situation." The trial court responded, "I understand. I understand. [¶] See if you can get [Mr. Colangelo] to agree or his—whoever stands in for him on Monday to agree to allow you phone access, and we'll try to move the case along. . . . [¶] . . . [¶] Hopefully we'll proceed on Monday morning [November 15, 2010] at ten o'clock."

On November 12, 2010, defendant filed a statement, under penalty of perjury, regarding his appearance at trial on November 15, 2010. Attached to the statement was a copy of defendant's confirmation from CourtCall to appear telephonically before the trial court on November 15, 2010. Defendant declared, however, "Despite my best effort and willingness to participate in the civil trial, I am unable to appear by phone on 11-15-10

due to the absence of my Unit Manager, Mr. Colangelo. No other alternate prison administrator I've asked is willing to become involved in this legal matter in Mr. Colangelo's absence." Defendant further stated, "[W]ith respect to my future appearance at trial by teleconference, I feel compelled to ask the court to consider . . . [the] security concerns." He added that the location of defendant's telephonic appearances are frequented by prison administrators and other inmates, and if other inmates were to discover that it were alleged that defendant engaged in child molestation, he would "most likely be in jeopardy again. . . ." Defendant concluded by stating, "I would ask that this civil matter be dismissed or postponed until such a time when I am released from federal custody . . . ."

At the November 15, 2010, trial, the trial court stated that in the morning it received defendant's November 12, 2010, statement, and at defendant's last appearance, "I had a discussion with [defendant] at the time regarding [his] appearance [at] today's date, and he quite candidly indicated he didn't know whether or not he would have phone access to call in this morning . . . . [¶] His statement, filed on the 12th and received by me [on] today's date, indicates that he does not have access to appropriate personnel within the federal penitentiary to enable him to make a court call appearance [on] today's date . . . . [¶] Realizing the lack of routine in trying to conduct this matter with [defendant] being in federal custody and the court being without authority or power to get him here physically, I was prepared to attempt to do this trial by way of court call, and that's what we anticipated beginning this morning's date. [Defendant] has made half a dozen or more previous appearances all by court call. Today's date, he was not available. [¶] And I would—based on his prior routine of appearing by way of court call, I would have attempted to work with his schedule if it was a matter of trailing the case for several days, a matter of a week or so, to get his appearance here. However, that does not seem to be an alternative that [defendant] has given us. He has provided me with his suggestion or request that the case either be, one, dismissed, or that the trial be postponed until sometime after he is released from federal custody, which my recollection is sometime either in 2013 or '14. So it's either a continuance of three or four years on the

case, or in the alternative, a dismissal of the case. I don't find that to be a viable alternative. And by virtue of that being the only suggestion that [defendant] gives me, the court is going to make the findings that he has voluntarily absented himself from these proceedings and I intend to proceed with trial in his absence."

The bench trial proceeded on November 15, 2010, in defendant's absence. Plaintiff, through her counsel, made an opening statement, put on evidence, and made a closing argument. The trial court rendered a decision in favor of plaintiff, awarding $2,900,000 in compensatory damages and $2,500,000 in punitive damages.

Diana Spielberger then filed a substitution of attorney as counsel for defendant, and a motion for new trial pursuant to Code of Civil Procedure section 657, on the ground, inter alia, that the trial court abused its discretion by proceeding to trial in defendant's absence.[4] Defendant stated in his declaration in support of the motion that since February 28, 2007, he has been incarcerated in federal prison, and he is serving an eight-year prison term. Defendant declared, "In order to make a CourtCall, I need to obtain permission from my Unit Manager, Mr. Colangelo, or his immediate supervisor, Ms. Devore, and Mr. Colangelo has to be present with me while I use the phone. . . . [¶] On November 9, 2010, I called into Court for trial. The Plaintiff's attorney indicated he

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[4] Code of Civil Procedure section 657 provides in part, "The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: [¶] 1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial. [¶] 2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors. [¶] 3. Accident or surprise, which ordinary prudence could not have guarded against. [¶] 4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial. [¶] 5. Excessive or inadequate damages. [¶] 6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law. [¶] 7. Error in law, occurring at the trial and excepted to by the party making the application."

did not have his witnesses ready and asked that the trial be continued to November 12, 2010, but the Court indicated it preferred to continue the trial to Monday, November 15, 2010. . . . I informed the Court that I doubted I would be able to call in to trial on November 15, due to the fact that Mr. Colangelo, was on what I understood was most likely a 2-week vacation. The Court indicated that it would send a copy of [an] order [requesting that defendant be permitted to attend telephonically the November 15, 2010, trial] to Ms. Devore, and I proceeded to arrange for the CourtCall. [¶] On or about November 10, 2010, I told Ms. Devore to expect a communication from the Court asking that I be allowed to telephone in to the trial on November 15, 2010. On the morning of November 15, 2010, I checked with the duty officer at 7:30 on my way to the carpentry shop, to see if Mr. Colangelo was in, and he said that Mr. Colangelo was not in. He asked if I had a 'call-out' to meet with the duty officer and I responded that I had checked the published call-out and had not seen my name listed by either Mr. Colangelo or Ms. Devore for the 10 a.m. CourtCall, which would have been the procedure had the Court contacted Ms. Devore or Mr. Colangelo. At the very least, had the Court asked Ms. Devore to allow me to make the call, I would have been allowed to call in to trial and I could have asked the Court for a continuance for a short period of time pending Mr. Colangelo's return from vacation, if the Court denied my request to continue the trial until my release from prison. [¶] After the trial, I asked both Mr. Colangelo and Ms. Devore if they had received any communication from the Court requesting I be allowed to call into Court on November 15, 2010. Neither had received any communications whatsoever. I asked them whether they would sign a declaration to that effect, and they said they would not sign anything presented by an inmate, but that such request had to come through an attorney."

Ms. Spielberger filed a declaration in support of the motion stating that, "In or about mid-December, [defendant] informed me that Ms. Devore, [defendant's] Unit Manager's supervisor, stated she did not receive any communication from the Court regarding the November 15, 2010 trial date, she would not give a declaration to [defendant], an inmate, and that any such request had to come through an attorney.

Accordingly, on December 29, 2010, I sent a letter to Ms. Devore asking her to contact me regarding this matter, and enclosed a draft declaration for her signature. Ms. Devore did not contact me, as a result of which I was unable to get a declaration from her as to the fact that, as I understand it, she did not receive any communication from the Court informing her of the November 15, 2010 trial proceedings . . . involving [defendant]."

At the hearing on the motion, the trial court stated that "there is no quarrel" about defendant's contention that the trial court must ensure incarcerated litigants meaningful access to the court. Defendant's counsel argued that if an indigent, incarcerated plaintiff fails to appear telephonically at a proceeding in the case, before the trial court can dismiss the case "the trial court must find based on the facts in the record that the [incarcerated plaintiff] has willfully failed to avail himself of the right to appear telephonically. [¶] In this case the record is clear that it wasn't willful. He did everything in his power—" The trial court stated, "I don't believe that's true at all."

The trial court also stated, "I said [to defendant] you have to let us know [if on November 15, 2010, he could not make the telephonic appearance because Mr. Colangelo or Ms. Devore were not available], because if it's a matter of trailing for a day or two until that person is available, we can accommodate that. [¶] The next thing I received from [defendant] was his motion giving me two alternatives; I could dismiss [the] case or continue it for four years when he had finished his sentence. Neither one of those seemed to be a reasonable alternative to a case which is required to have preferential sentencing because of a child victim. [¶] It was clear to me that [defendant's] actions on that date, as well as through the pendency of this civil litigation was once again characteristic of his efforts and attempts to manipulate the system, and what I see is a continuing victimization of the plaintiff. [¶] And that's clearly what I believe went on the day the matter was set for trial."[5]

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[5] Code of Civil Procedure section 36, subdivision (b) provides, "A civil action to recover damages for . . . personal injury shall be entitled to preference upon the motion of any party to the action who is under 14 years of age unless the court finds that the party does not have a substantial interest in the case as a whole. A civil action subject to

Defendant's counsel stated at the hearing that, "to the extent that the trial court elects to rely on telephonic hearings to provide [defendant with] access [to the court], the court may wish to communicate itself telephonically and/or by letter with prison personnel to determine what logistical arrangements are necessary to enable the prisoner to appear telephonically and make sure that both court staff and prison personnel make those arrangements." The trial court responded, "Both of those things were done, counsel." The following exchange followed: "[Defendant's counsel:] Your Honor, the letter was—the suggestion was sent to the prison? [Trial court:] Yes, Ma'am. [Defendant's counsel:] Oh, is there any record of that? [Trial court:] Should be. We indicated early on in this case that the matter would be handled telephonically. And we have always sent in requests that the defendant be allowed telephone access. [Defendant's counsel:] Oh, where is that file? I mean, I never saw any record of that at all. [Trial court:] You may find it interesting to note that [defendant] made numerous telephonic appearances during the course of this case. [Defendant's counsel:] Right. Exactly. The court had ordered on October 18, and I have the order here, that he could appear in this case by telephone. And then suddenly when he tries to do it, he is deprived of that opportunity." The trial court denied defendant's motion for a new trial.

*2. Standard of Review*

"The trial court determines the appropriate remedy to secure [a prison litigant's] access [to the courts] in the exercise of its sound discretion. (*Yarbrough v. Superior Court* [(1985) 39 Cal.3d [197,] 200, 207; *Payne v. Superior Court* (1976) 17 Cal.3d 908, 927.) The exercise of the trial court's discretion will not be overturned on appeal 'unless it appears that there has been a miscarriage of justice.' (*Denham v. Superior Court*

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subdivision (a) shall be given preference over a case subject to this subdivision." The trial court has no discretion to deny a motion filed under this section by a party under 14 years of age who has a substantial interest in the case as a whole. (*Peters v. Superior Court* (1989) 212 Cal.App.3d 218, 223-224.) The record does not indicate whether plaintiff filed a motion for trial preference, or that trial priority had been granted.

(1970) 2 Cal.3d 557, 566 [86 Cal.Rptr. 65, 468 P.2d 193].)" (*Wantuch v. Davis* (1995) 32 Cal.App.4th 786, 794.) "[W]hile a trial court has discretion to determine the proper remedy by which to safeguard a prisoner litigant's right of meaningful access to the courts, 'a trial court does not have discretion to choose *no remedy* in cases where the prisoner's civil action is bona fide and his or her access to the courts is being impeded.'" (*Jameson v. Desta* (2009) 179 Cal.App.4th 672, 683, citing *Apollo v. Gyaami* (2008) 167 Cal.App.4th 1468, 1484.)

"'When a trial court has resolved a disputed factual issue, an appellate court reviews the ruling according to the substantial evidence rule. The trial court's resolution of the factual issue must be affirmed if it is supported by substantial evidence. (*Winograd v. American Broadcasting Co*. (1998) 68 Cal.App.4th 624, 632 [80 Cal.Rptr.2d 378].) We look at the evidence in support of the trial court's finding, resolve all conflicts in favor of the respondent and indulge in all legitimate and reasonable inferences to uphold the finding.' (*Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1290 [87 Cal.Rptr. 2d 497].)" (*Carpenter & Zuckerman, LLP v. Cohen* (2011) 195 Cal.App.4th 373, 378.)

We review the trial court's denial of a continuance under the abuse of discretion standard. (*Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 716.) "'An abuse of discretion occurs when, in light of applicable law and considering all relevant circumstances, the court's ruling exceeds the bounds of reason. [Citations.]' [Citations.]" (*Cotton v. StarCare Medical Group, Inc*. (2010) 183 Cal.App.4th 437, 444; see also *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.) The trial judge "'"must exercise his discretion with due regard to all interests involved, and the refusal of a continuance which has the practical effect of denying the applicant a fair hearing is reversible error. [Citations.]"' [Citation.]" (*Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389, 1395.)

A motion for new trial may be made on the ground of the denial of a motion to continue a trial. (*Henderson v. Drake* (1953) 118 Cal.App.2d 777, 780-781, 788.)

"Innumerable cases, both civil and criminal, have said that the trial court has broad discretion in ruling on a new trial motion, and that the ruling will be disturbed only for clear abuse of that discretion. [Citations.]" (*People v. Ault, supra*, 33 Cal.4th at p. 1260.) Other cases, however, have distinguished between orders granting and orders denying a new trial, proposing that the deferential abuse of discretion standard is inappropriate where a motion for a new trial is denied in the lower court. (*Id*. at pp. 1260-1261.) "The latter decisions indicate that where the complaining party reasserts, on appeal, the claims previously raised in an unsuccessful new trial motion, the appellate court must employ independent review and judgment to determine if prejudicial trial error occurred." (*Id*. at p. 1261, fn. omitted.) "Different considerations apply, it is said, when a trial court denies a new trial. Such an order is not independently appealable [citations]; instead, the grounds for the unsuccessful motion are assessed on appeal from the underlying final judgment against the complaining party [citation]. Accordingly, article VI, section 13 of the California Constitution obliges the appellate court to conduct an independent examination of the proceedings to determine whether a miscarriage of justice occurred. As in any appeal from a final judgment, the reviewing court must determine for itself whether errors denied a fair trial to the party against whom the judgment was entered." (*Id*. at pp. 1261-1262, fns. omitted.)

*3. Legal Principles*

The Fourteenth Amendment to the United States Constitution and article I, section 7, subdivision (a) of the California Constitution ensure that an individual may not be deprived of life, liberty or property without due process of law. In this connection, unless there is some overriding state interest, parties must be provided with a meaningful opportunity for access to the court. (*Boddie v. Connecticut* (1971) 401 U.S. 371, 377; *Salas v. Cortez* (1979) 24 Cal.3d 22, 26-27; *Payne v. Superior Court, supra*, 17 Cal.3d at p. 914; *Malek v. Koshak* (2011) 200 Cal.App.4th 1540, 1547.)

Our state Supreme Court added, "Few liberties in America have been more zealously guarded than the right to protect one's property in a court of law. This nation

has long realized that none of our freedoms would be secure if any person could be deprived of his possessions without an opportunity to defend them '"at a meaningful time and in a meaningful manner."' (*Fuentes v. Shevin* (1972) 407 U.S. 67, 80 [32 L.Ed.2d 556, 569-570, 92 S.Ct. 1983].)" (*Payne v. Superior Court, supra,* 17 Cal.3d at p. 911.) "[T]he United States Supreme Court has long recognized a constitutional right of access to the courts for all persons, including prisoners. [Citations.]" (*Id.* at p. 914.)

A prisoner who is a defendant in a civil action has a federal and state constitutional right, as a matter of due process and equal protection, of meaningful access to the courts in order to present a defense. The prisoner may not be deprived of "meaningful access" to the civil courts "if the prisoner is . . . indigent and a party to a bona fide civil action threatening his or her personal or property interests." (*Wantuch v. Davis, supra*, 32 Cal.App.4th at p. 792.) "Meaningful access to the courts is the 'keystone' of an indigent prisoner's right to defend against and prosecute bona fide civil actions. [Citations.] Meaningful access . . . by an indigent prisoner 'does not necessarily mandate a particular remedy' to secure access. [Citation.]" (*Ibid.*)

"'[I]n propria persona litigants . . . are entitled to the same, but no greater, rights than represented litigants,' and that 'trial courts have a duty in the name of public policy to expeditiously process civil cases.' (*Apollo v. Gyaami, supra*, 167 Cal.App.4th at p. 1487.) 'Adherence to these important principles, however, must yield to the even greater principles of providing in propria persona litigants with meaningful access to the courts and of deciding bona fide civil actions on their merits.' (*Ibid.*)" (*Jameson v. Desta, supra,* 179 Cal.App.4th at p. 684.) As one court noted, "'[p]rison walls are a powerful restraint on a litigant wishing to appear in a civil proceeding.' Given this, all courts have an obligation to ensure those walls do not stand in the way of affording litigants with bona fide claims the opportunity to be heard." (*Apollo v. Gyaami, supra,* 167 Cal.App.4th at p. 1487.)

*4. Analysis*

The trial court has a duty to conduct an adequate investigation of whether defendant willfully failed to avail himself of the right to appear telephonically. (See *Payne v. Superior Court*, *supra*, 17 Cal.3d at pp. 922-923, 926; *Jameson v. Desta*, *supra*, 179 Cal.App.4th 672 at p. 684.) In discussing the duties of a trial court to conduct an investigation, our Supreme Court said, "When the court was informed by [the defendant] that the original judgment was taken against him while he was incarcerated and unable to obtain an attorney or personally appear to defend, a duty arose to determine whether [the defendant] had been denied meaningful access to the courts." (*Payne v. Superior Court*, *supra*, 17 Cal.3d at p. 926.) Another court added, "[B]efore a trial court may dismiss an action [brought by prisoner plaintiff] on the ground that an indigent prisoner has failed to appear telephonically at proceedings in the case, the trial court must find, based on facts in the record, that the prisoner has willfully failed to avail himself of the right to appear telephonically." (*Jameson v. Desta*, *supra*, 179 Cal.App.4th at p. 675.) There is little difference between dismissing a prisoner plaintiff's action and proceeding to trial in the absence of a prisoner defendant. Under both circumstances, the prisoner effectively is deprived of his or her property interest in the litigation.

At the November 15, 2010, trial, the trial court found that defendant "voluntarily absented himself from these proceedings" because he filed a motion to continue the trial because of security reasons and based on the defendant's request, the trial court concluded that it could only grant a continuance for three or four years, or in the alternative, a dismissal of the case. At the hearing on defendant's motion for new trial, the trial court disagreed with the contention that defendant did not willfully fail to avail himself of the right to appear telephonically and stated defendant's motion to continue the trial gave it "two alternatives; I could dismiss [the] case or continue it for four years when he had finished his sentence. Neither one of those seemed to be a reasonable alternative to a case which is required to have preferential sentencing because of a child victim. [¶] It is clear to me that [defendant's] action on that date, as well as through the pendency of this civil litigation was once again characteristic of his efforts and attempts

to manipulate the system, and what I see is a continuing victimization of the plaintiff. [¶] And that's clearly what I believe went on the day the matter was set for trial." Defendant contends that it was not a tactical decision not to retain counsel to represent him below, because he was indigent and could not afford an attorney, and the trial court denied him access to the courts by proceeding to trial without his ability to appear telephonically. Just because defendant proposed two alternative remedies does not relieve the trial court of the obligation to conduct the necessary investigation, and if necessary, provide for an appropriate remedy. The trial court did not conduct the required investigation to determine whether defendant had been denied meaningful access to the courts or had willfully failed to avail himself of the right to appear at trial by some means.

The court in *Payne v. Superior Court, supra*, 17 Cal.3d at page 926 said, "The [trial] court . . . has the discretion to determine . . . whether [defendant] stands to be deprived of a substantial interest in the proceedings against him." The court issued a peremptory writ of mandate directing the trial court to vacate the judgment, and "if it finds that [the defendant] is incarcerated and indigent," the trial court in exercising its discretion shall determine how to achieve the defendant's rights to meaningful access to the courts. (*Id*. at pp. 923, 924, 927.)

Code of Civil Procedure section 43 empowers the Supreme Court and the courts of appeal to "affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order be entered, or direct a new trial or further proceedings to be had." Our Supreme Court has invoked the power to conditionally reverse a judgment and remand the action for further proceedings to determine error and prejudice under the parallel provision in Penal Code section 1260.[6] (See *People v. Gaines* (2009) 46 Cal.4th 172, 180-181; *People v. Johnson* (2006) 38 Cal.4th 1096, 1100 ["We have

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[6] "The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances." (Pen. Code, § 1260.)

recognized that in some situations the limited remand 'procedure is preferable to reversal of the judgment. [Citations.]' [Citation.]".)

We conditionally reverse with a limited remand for further proceedings for the trial court to conduct an investigation of whether defendant willfully failed to avail himself of the right to appear telephonically. If, upon a full hearing, the trial court concludes defendant actually wished to participate on the day of trial and was, in fact, denied access to the court, the matter shall be retried fully. If the trial court determines that defendant willfully failed to avail himself of the right to appear telephonically and had meaningful access to the court, liability would be established, but the matter will be remanded to the trial court for proceedings to determine the amount of damages, as discussed below.

**B. Damages**

Assuming on the limited remand the trial court concludes that defendant willfully failed to avail himself at trial, a new trial would not ensue on liability, but as stated below, the matter is remanded to the trial court for proceedings to determine the amount of damages for pain and suffering and future medical expenses.

*1. Compensatory Damages Using Federal Statute Regarding Possession of Child Pornography*

Defendant contends that the trial court erred in awarding compensatory damages against him based on a federal statute that was not pleaded or proven, and had no logical relation to the damage allegedly suffered by plaintiff. The trial court erred by using the federal statute as a guide to calculating amount of pain and suffering damages.

At the conclusion of plaintiff's opening statement at trial, the trial court inquired of plaintiff's counsel, "Will I be hearing witnesses testifying specifically on the issue of damages or how damages are ascertained?" Plaintiff's counsel responded, "I will offer to the court a Federal Statute, which though we're not in federal court, obviously, I believe gives a good measure for damages for the court to look at. It is U.S. 18 USC 2255, which

indicates for each incident of child exploitation, that being each photograph, each incident of abuse, the minimum measure of damages is $150,000. Now that is submitted only as a guide to Your Honor, not as a requirement."

During plaintiff's counsel's closing argument, plaintiff directed the trial court's attention to defendant's federal guilty plea to possession of child pornography in violation of Title 18 United States Code section 2252A(a)(5)(B), which stated that "in total, defendant took [16] photographs of the lascivious exhibition of the genital and pubic areas of the [plaintiff]." Plaintiff's counsel then advised the trial court, "I described to Your Honor previously the federal code section. I just wanted to make sure I mentioned it again, which is 18 USC 2255 and also 2252(A). 2252(A) has to do with photographs, and 2255 has to do with the minimum measure of damages in federal court for this type of conduct or incident."

Thereafter, the following exchange occurred: "[Trial court:] Are you going to make any dollar suggestion to the court, or are you leaving it to the court's discretion? [Plaintiff's counsel:] Certainly in Your Honor's discretion. I would say multiply it 16 by a hundred fifty, that would be what I would suggest. [Trial court:] Which would be a figure of— . . . . [Plaintiff's counsel:] 2.4 million. [Trial court:] Thank you sir. [¶] The court's going to enter judgment for the plaintiff. . . . [I]n finding some guidelines in the suggestion of the appropriate damages to be awarded, by suggestion of the United States Code, I am going to, for the issuance—for the taking just of the photographs, I am going to set damages in the amount of $2,400,000."

Title 18 United States Code section 2255 provides that a "a victim of a violation of section . . . 2252A" may "sue in any appropriate United States District Court" and "shall be deemed to have sustained damages of no less than $150,000 in value."[7] (18 U.S.C.

[7] Title 18 United States Code section 2255(a) states in relevant part, "Any person who, while a minor, was a victim of a violation of section . . . 2252A . . . of this title [18 USCS § . . . 2252 . . .] and who suffers personal injury as a result of such violation, regardless of whether the injury occurred while such person was a minor, may sue in any appropriate United States District Court and shall recover the actual damages such person sustains and the cost of the suit, including a reasonable attorney's fee. Any person as

2255(a).) The violation of Title 18 United States Code section 2252A occurs when a person improperly has "an image of child pornography . . . ."[8] (18 U.S.C. 2252A(a)(5)(B).)

Defendant does not contend, nor can he reasonably do so, that there was not sufficient evidence that plaintiff suffered pain and incurred damages caused by defendant. "[E]ven in the absence of any explicit evidence showing pain, the jury may infer such pain, if the injury is such that the jury in its common experience knows it is normally accompanied by pain. [Citation.] Indeed, for certain injuries the inference of pain may be so compelling that the trial judge would be justified in ordering a new trial if the jury declines to draw it. '[The] items of pain, suffering and inconvenience . . . are inevitable concomitants with grave injuries. . . .' [Citation.]" (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 896.) The trial court, however, erred in using Title 18 United States Code section 2255(a), based on defendant's guilty plea in the United States District Court to violation of section 2252A(a)(5)(B)— child pornography provision—as a "guide" for awarding the amount of the damages.

Plaintiff filed a complaint alleging causes of action for sexual battery and breach of fiduciary duty against defendant. Plaintiff did not assert a cause of action against defendant for possession of child pornography.

Plaintiff contends that defendant is liable for taking and possessing pornographic photographs of her because she "did allege in the complaint the fact of the photographs

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described in the preceding sentence shall be deemed to have sustained damages of no less than $150,000 in value."

[8] Title 18 United States Code section 2252A states in pertinent part, "(a) Any person who—(5) . . . (B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer . . . shall be punished as provided in subsection (b) . . . ."

being taken by [defendant] and the injuries [plaintiff] suffered from his conduct of taking the pictures . . . ." Although the complaint makes such an allegation, plaintiff has not established that defendant is liable to her for it under the asserted causes of action.

"A person commits a sexual battery who does any of the following: [¶] (1) Acts with the intent to cause a harmful or offensive contact with an intimate part of another, and a sexually offensive contact with that person directly or indirectly results. [¶] (2) Acts with the intent to cause a harmful or offensive contact with another by use of his or her intimate part, and a sexually offensive contact with that person directly or indirectly results. [¶] (3) Acts to cause an imminent apprehension of the conduct described in paragraph (1) or (2), and a sexually offensive contact with that person directly or indirectly results." (Civ. Code, § 1708.5, subd. (a).) An "'intimate part' means the sexual organ, anus, groin, or buttocks of any person, or the breast of a female." (Civ. Code, § 1708.5, subd. (d).) A cause of action for sexual battery, therefore, does not impose liability for taking pornographic photographs.

The elements of a claim for breach of fiduciary duty are (1) the existence of a relationship giving rise to fiduciary duties, (2) a breach of the duties, and (3) damage proximately caused by that breach. (*Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1405.) Plaintiff's cause of action against defendant for breach of fiduciary duty alleges that "By accepting custody of plaintiff defendant[] stood in the roll of in loco parentis over plaintiff while in [his] care. Because of plaintiffs [*sic*] young age and emotional level [defendant] entered into a fiduciary and/or confidential relationship with the minor [p]laintiff." The trial court did not find that defendant had a fiduciary relationship with plaintiff, nor has plaintiff argued on appeal, or cited to the record or any authorities, that defendant had such a relationship with her. Therefore, defendant would not be liable to plaintiff for taking pornographic photographs under a purported cause of action for breach of fiduciary duty.

As noted, there was sufficient evidence that plaintiff suffered pain and damages caused by defendant. The trial court erred by using Title 18 United States Code section 2255 as a guide to calculating those damages. We, therefore reverse and remand this

matter to the trial court for proceedings to determine the damages amount to be awarded to plaintiff for pain and suffering. (*Capelouto v. Kaiser Foundation Hospitals*, *supra*, 7 Cal.3d at pp. 897-898 [limited remand on the issue of damages alone where there was "ample evidence" of defendant's liability and the damages award was based on the trial court's erroneous jury instructions.]

*2. The Award of $500,000 in Damages for Future Medical Treatment*

Defendant contends that the award of future medical treatment against him is not supported by substantial evidence. We reverse and remand the matter to the trial court to conduct proceedings for an appropriate determination of the amount of those damages as well.

The trial court stated, "The court is going to add an additional $500,000 in compensatory damages, representing what I believe to be probably an extended period of time that the minor child will need counseling and I suspect the family may need counseling, as well. I enter that figure somewhat in a vacuum, but having some experience as to the cost of psychiatric and psychological counseling based on 24 years on the bench and 30 plus years—or 34 years in practice and the bench, and as young as the child is, it's not inconceivable that she will be paying for this for a period of years to come."

Plaintiff does not address in her respondent's brief defendant's contention that there is no evidence in the record, let alone substantial evidence, to support the $500,000 damages award for future medical expenses. A review of the record confirms there was no evidence of such expenses. Based on defendant's actions and plaintiff's young age, plaintiff undoubtedly will need future medical expenses for mental therapy under the circumstances of this case. Yet, there is not substantial evidence supporting the amount of the award—$500,000. We therefore reverse and remand the matter to the trial court for proceedings to make an appropriate determination of the amount of those damages. (*Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 691, 696, 697 [remand on the issue of damages alone where appellant had moved for new trial, and there was

insufficient evidence to support an award of future lost wages.].) There are authorities that suggest, particularly if appellant filed a motion for judgment notwithstanding the verdict, if the matter is reversed for insufficiency of evidence, it is not remanded for a new trial. (See, e.g., *McCoy v. Hearst Corp*. (1991) 227 Cal.App.3d 1657, 1659-1663; *Bank of America v. Superior Court* (1990) 220 Cal.App.3d 613, 623, 625; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §§ 870, 871, 877, pp. 929-934, 939.) But we believe that because the damages may be inferred, when there is insufficient evidence of the *amount* of damages awarded, the matter may be remanded for further evidence and consideration of that amount.

*3. Punitive Damages*

Defendant contends that there was not substantial evidence in support of the $2,500,000 punitive damages award against him. We agree.

"Civil Code section 3294, subdivision (a) permits an award of punitive damages 'for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice.' We review the trial court's award of punitive damages for substantial evidence. [Citation.] 'An award of punitive damages hinges on three factors: the reprehensibility of the defendant's conduct; the reasonableness of the relationship between the award and the plaintiff's harm; and, in view of the defendant's financial condition, the amount necessary to punish him or her and discourage future wrongful conduct.' [Citations.]" (*Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 679.)

Evidence of the defendant's financial condition is a prerequisite for an award of punitive damages. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 108-109 ["an award of punitive damages cannot be sustained on appeal unless the trial record contains meaningful evidence of the defendant's financial condition"].) Plaintiff has the burden of proof. (*Id*. at p. 119.) In *Baxter v. Peterson, supra,* 150 Cal.App.4th 673, this court summarized the pertinent court of appeal authorities on the point: "Net worth is the most common measure, but not the exclusive measure. (*Rufo v. Simpson* (2001) 86

Cal.App.4th 573, 621, 624-625 [103 Cal.Rptr.2d 492] [evidence that defendant was 'a wealthy man, with prospects to gain more wealth in the future']; see *Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal.App.4th 577, 582-583 [107 Cal.Rptr.2d 308] ['Net worth is too easily subject to manipulation to be the sole standard for measuring a defendant's ability to pay'].) In most cases, evidence of earnings or profit alone are not sufficient 'without examining the liabilities side of the balance sheet.' [Citations.] 'What is required is evidence of the defendant's ability to pay the damage award.' [Citation.] Thus, there should be some evidence of the defendant's actual wealth. Normally, evidence of liabilities should accompany evidence of assets, and evidence of expenses should accompany evidence of income." (*Baxter v. Peterson*, *supra*, 150 Cal.App.4th at p. 680; see also *Green v. Laibco, LLC* (2011) 192 Cal.App.4th 441, 452.)

There is little evidence of defendant's actual assets or income and no evidence of his liabilities. Defendant's wife testified at the November 15, 2010, trial that she "think[s]," but does not recall, defendant's gross income in 2005 was "around $100,000." Defendant's wife also testified that at the time of trial, defendant had an income of $5 per month. At the November 9, 2010, scheduled trial, defendant explained, "That's working a 40 hour week. $5 a month. I am here until February of 2014." Defendant's wife also testified in responses to discovery verified in March 2010, that defendant had no royalty income, and owned five non-operational vehicles manufactured between 1949 and 1970.

Plaintiff argues, based on an "Affidavit of Surety(ies) (Property)" executed by defendant's wife, in April 2006, that defendant was the co-owner of a home that had an estimated equity of $450,000. Plaintiff contends, however, that defendant subsequently fraudulently transferred his interest in the property to defendant's wife. The transfer was fraudulent, according to plaintiff, because defendant's wife testified in her deposition that she had not paid defendant any money since 2006.

The transfer of the real property occurred in October 2006, but the record does not disclose that plaintiff ever filed a fraudulent conveyance claim against defendant or his wife, or that the conveyance has been set aside. In addition, testimony of defendant's

wife that she had not paid any money to defendant since 2006 does not necessarily establish that she did not give defendant any consideration for the transfer of the real property. Also, plaintiff may not have standing to set aside the transaction as a fraudulent conveyance. (Civ. Code §§ 3439.04, 3439.07.) And defendant may not have intended to hinder, delay, or defraud plaintiff, and the claim may be barred by the applicable four year statute of limitations (Civ. Code § 3439.09).

Plaintiff failed to present meaningful evidence of defendant's liabilities, or other evidence, that would indicate his ability to pay a punitive damage award. Based on this record, there is insufficient evidence to support defendant's ability to pay punitive damages. (See *Baxter v. Peterson*, *supra*, 150 Cal.App.4th at pp. 679-680; *Storage Services v. Oosterbaan* (1989) 214 Cal.App.3d 498, 517 ["in the absence of any evidence of [his] wealth, the punitive damage award . . . must be reversed"].) Unlike when the right to compensatory damages is established but there is insufficient evidence of the amount, "[w]hen a punitive damage award is reversed based on the insufficiency of the evidence, no retrial of the issue is required." (*Baxter v. Peterson*, *supra*, 150 Cal.App.4th at p. 681.) Accordingly, the punitive damage award is reversed, and there shall be no retrial on that matter if there is no retrial of the entire trial.

If, however, the trial court determines that defendant was denied access to the court, there must be a retrial of all issues. The trial that took place without defendant having access, would, in effect, be a nullity. Under those circumstances, the parties shall have the opportunity to assert and prove all claims and defenses, respectively, including plaintiff's claim for punitive damages.[9]

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[9] It is true that plaintiff had an opportunity to present her case for punitive damages, but whether it was a "'full and fair opportunity'" (*Baxter v. Peterson*, *supra*, 150 Cal.App.4th at p. 681), without the presence of defendant who could be compelled to disclose information about his financial condition, is questionable.

## DISPOSITION

The judgment is reversed, and the matter is remanded to the trial court for further proceedings consistent with this opinion. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.